Supreme Court, U. S.
FILED
FEB 15 1977
MICHAEL RODAK, JR., CLERK

No. 76-1044

In the Supreme Court of the United States

OCTOBER TERM, 1976

ESTATE OF LEONARD E. WHITLOCK, DECEASED, ET AL.,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE COMMISSIONER IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1044

ESTATE OF LEONARD E. WHITLOCK, ET AL.,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE COMMISSIONER IN OPPOSITION

Petitioners challenge the court of appeals' issuance of a writ of mandamus directing respondent Bruce M. Forrester, a Judge of the United States Tax Court, to comply with its mandate in *Estate of Whitlock* v. *Commissioner*, 494 F. 2d 1297, certiorari denied, 419 U.S. 839, rehearing denied, 419 U.S. 1041, and its dismissal of the Commissioner's appeal from an order entered by Judge Forrester which refused to enforce the mandate of the court of appeals.

In its original decision on the merits in this federal income tax case, the Tax Court held that Section 951(d) of the Internal Revenue Code of 1954 (26 U.S.C.) precluded the inclusion in petitioners' gross income of the "increase in earnings invested [by their "controlled foreign

corporation"] in United States property" pursuant to Section 951(a)(1)(B) of the Code for any year in issue for which their "controlled foreign corporation" was also a "foreign personal holding company" under Section 552 of the Code[1] (59 T.C. 490, 494-503). The court of appeals reversed and upheld the Commissioner's position that such an increase in earnings was includable in petitioners' income (494 F. 2d at 1298-1301). After this Court denied certiorari and rehearing, the court of appeals issued its mandate to the Tax Court on November 27, 1974, in accordance with Rule 41 of the Federal Rules of Appellate Procedure (Pet. App. A3-A4).

The case was thereupon reassigned to Judge Forrester of the Tax Court for further action required by the mandate. On March 25, 1975, Judge Forrester vacated the original decision and requested the parties to submit recomputations of the tax deficiencies pursuant to that mandate (Pet. App. A4).[2] Although the Commissioner submitted a recomputation (R. 374-383),[3] petitioners filed a motion (R. 339-347) which sought to reinstate the original decision or simply to have the court refrain, indefinitely, from entering a new decision in accordance with the mandate (Pet. App. A4).

On October 9, 1975, Judge Forrester set aside his order of March 25, 1975, in which he had vacated the original decision in favor of petitioners (Pet. App. A22-A23). Because of the possibility that the second order might be deemed an appealable decision, the Commissioner filed a

---

[1]The facts are set forth in our brief in opposition to petitioners' original petition for a writ of certiorari (No. 73-1889, October Term 1974).

[2]See 2 Casey, *Federal Tax Practice*, §§ 8.45 and 8.46 (1955); Rule 155 of the Rules of Practice and Procedure of the Tax Court.

[3]"R." refers to the record filed in the court of appeals.

notice of appeal (Pet. App. A23-A24). The Commissioner also filed a petition for a writ of mandamus directing Judge Forrester to comply with the mandate of the court of appeals (Pet. App. A25-A26).

The court of appeals held that Judge Forrester's order of October 9, 1975, was interlocutory and was not a final decision appealable under 26 U.S.C. 7482(a). It accordingly dismissed the Commissioner's appeal (Pet. App. A7). However, the court of appeals also concluded that there was no basis for Judge Forrester's failure to comply with its mandate. It therefore held that mandamus was a proper remedy and issued the writ (Pet. App. A9-A10).

1. Petitioners contend (Pet. 18-19) that the court of appeals erred in holding that the Tax Court's order of October 9, 1975, was not an appealable decision. From that premise, they argue that the mandamus was improper because appellate review was available. They also urge that the Commissioner's appeal was untimely because 26 U.S.C. 7481(a)(3)(B) provides that a Tax Court decision entered upon remand becomes final if a notice of appeal is not filed within 30 days after the entry of decision.

But as the court of appeals correctly noted (Pet. App. A7-A9), the Tax Court's order left the mandate unenforced and did not reinstate the original Tax Court decision. At all events, mandamus was both a timely and appropriate remedy.

A reviewing court may enforce compliance with its mandate either by subsequent appellate proceedings or by mandamus issued under 28 U.S.C. 1651(a) in aid of its appellate jurisdiction. See *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255; *In re Potts*, 166 U.S. 263, 265; *Delaware, L. & W. R.R.* v. *Rellstab*, 276 U.S. 1, 5; *B. & O. R. Co.* v. *United States*, 279 U.S. 781, 785. Indeed, as the Court observed in *United States* v. *United States District Court*,

334 U.S. 258, 264, it is the "high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court." See also *United States* v. *Haley*, 371 U.S. 18; *Yablonski* v. *United Mine Workers of America*, 454 F. 2d 1036, 1038 (C.A.D.C.).

Moreover, there are no specific time limits for filing a petition for a writ of mandamus under either 28 U.S.C. 1651 or Rule 21 of the Federal Rules of Appellate Procedure. Finally, even assuming *arguendo* that the Tax Court's order reinstated its original decision in favor of petitioners, the 30-day time limit of Section 7481(a)(3)(B) is inapplicable because the Commissioner's notice of appeal prevented the Tax Court's order from becoming a final decision.

2. Petitioners also argue (Pet. 19-25) that the court of appeals erred in failing to reexamine the merits of its original decision on the merits. While several courts of appeals have suggested that they may reexamine their decisions under certain "extraordinary conditions" (*Trice* v. *Commercial Union Assurance Co.*, 397 F. 2d 889, 890 (C.A. 6); see also, *e.g.*, *Greater Boston Television Corporation* v. *Federal Communications Commission*, 463 F. 2d 268, 275-280 (C.A.D.C.); *Toucey* v. *New York Life Ins. Co.*, 112 F. 2d 927, 928 (C.A. 8)), there are no such "extraordinary conditions" here. Indeed, the "manifest injustice" that petitioners argue (Pet. 19, 21) requires a reconsideration of the merits is simply that the decision in a case pending in the Court of Claims might ultimately conflict with the decision below.[4] Such a potential conflict does not warrant any further delay in the enforcement of the mandate in this case.

---

[4]No trial has been held and no motions for summary judgment have been filed in the case pending in the Court of Claims (*Lovett* v. *United States*, No. 191-74).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

FEBRUARY 1977.